89-525

Supreme Court, U.S.
FILED
SEP 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

AHMADE RATEB POPAL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOEL B. RUDIN
Mass & Rudin
Attorneys for Petitioner
Ahmade Rateb Popal
415 Madison Avenue, Seventh Floor
New York, New York 10017
(212) 969-9200

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

QUESTIONS PRESENTED

I. Does the holding of *Gomez* v. *United States*, 109 S.Ct. 2237 (1989), that a federal magistrate lacks jurisdiction to preside at jury selection at a felony trial require reversal of a conviction where the defendant neither consented nor objected to such an unauthorized procedure?

II. Does a federal felony defendant waive his personal right to trial before a tribunal with jurisdiction to preside merely by failing to object, where Congress has expressly required that such waivers be unequivocal, knowing, voluntary, and written?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
OPINIONS BELOW	2
JURISDICTION AND TIMELINESS	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
REASON FOR GRANTING THE WRIT	7
THE HOLDING IN *GOMEZ* V. *UNITED STATES* THAT A MAGISTRATE LACKS JURISDICTION TO CONDUCT JURY SELECTION IN A FELONY TRIAL REQUIRES THAT PETITIONER'S CONVICTION BE REVERSED, AT LEAST WHERE HE DID NOT EXECUTE A KNOWING, VOLUNTARY, WRITTEN CONSENT; ALTERNATIVELY, THE COURT SHOULD RESOLVE THE CONFLICT IN THE CIRCUITS CONCERNING *GOMEZ'S* APPLICATION TO CASES IN WHICH THE DEFENDANT FAILED TO OBJECT	6
CONCLUSION	13
APPENDIX	1a

TABLE OF AUTHORITIES

Cases	Page
Aldinger v. *Howard*, 427 U.S. 1 (1976)	8
Ambrose v. *Welch*, 729 F.2d 1084 (6th Cir. 1984)	10
Boykin v. *Alabama*, 395 U.S. 238 (1969)	9
California v. *LaRue*, 409 U.S. 109 (1972)	8
Calloway v. *Marvel Entertainment Group*, 854 F.2d 1452 (2d Cir. 1988), *cert. granted sub nom. Pavelic & LeFlore* v. *Marvel Entertainment Group*, 109 S.Ct. 1116 (1989)	11
Caprera v. *Jacobs*, 790 F.2d 442 (5th Cir. 1986)	10
Cary v. *Curtis*, 44 U.S. (3 How.) 236 (1845)	8
Ford v. *United States*, ___ U.S. ___, 108 S.Ct. 741 (1988)	11
Gomez v. *United States*, 109 S.Ct. 2237 (1989)	*passim*
Griffith v. *Kentucky*, 479 U.S. 314 (1987)	7n
Guam v. *Yang*, 850 F.2d 507 (9th Cir. 1988)	11
Hall v. *Sharpe*, 812 F.2d 644 (11th Cir. 1987)	10
Johnson v. *Zerbst*, 304 U.S. 458 (1938)	9
Lovelace v. *Dall*, 820 F.2d 223 (7th Cir. 1987)	10
McCarthy v. *United States*, 394 U.S. 459 (1969)	9
McClaughry v. *Deming*, 186 U.S. 49 (1902)	8
Miranda v. *Arizona*, 384 U.S. 436 (1966)	10
Schneckloth v. *Bustamonte*, 412 U.S. 218 (1973)	9
United States v. *Atkinson*, 297 U.S. 157 (1936)	12
United States v. *DeFiore*, 720 F.2d 757 (2d Cir. 1983), *cert. denied*, 466 U.S. 906 (1984)	6, 8, 10
United States ex rel. O'Connor v. *New Jersey*, 405 F.2d 632 (3d Cir.), *cert. denied sub nom. O'Connor* v. *Yeager*, 395 U.S. 923 (1969)	11
United States v. *France*, ___ F.2d ___, 1989 Westlaw 104012 (9th Cir., September 13, 1989)	8, 10, 11
United States v. *Garcia*, 848 F.2d 1324 (2d Cir. 1988), *rev'd sub nom. Gomez* v. *United States*, 109 S.Ct. 2237 (1989)	5, 6, 12
United States v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965)	11
United States v. *Mang Sun Wong*, ___ F.2d ___, Dkt. No. 88-1100, Slip Op. 7531 (2d Cir., Sept. 5, 1989)	8
United States v. *Marcyes*, 557 F.2d 1361 (9th Cir. 1977)	10

Table of Authorities Continued

Page

United States v. *Miller*, 468 F.2d 1041 (4th Cir. 1972), *cert. denied*, 410 U.S. 935 (1973) 10

United States v. *Young*, 470 U.S. 1 (1985) 12

STATUTES AND CONSTITUTIONAL PROVISIONS

U.S. CONSTITUTION

Article III 9

Fifth Amendment 9

Sixth Amendment 9

Title 18, United States Code, Section 3231 8

Title 18, United States Code, Section 3401 ..... 4, 9

Title 28, United States Code, Section 636 ..... 3-4, 9

Title 28, United States Code, Section 1254(1) 2

Federal Rule of Civil Procedure 11 11

Federal Rule Criminal Procedure 11(c)(3) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. ___

AHMADE RATEB POPAL

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Ahmade Rateb Popal, respectfully requests that a Writ of Certiorari be issued to review a judgment of the United States Court of Appeals for the Second Circuit entered in the above-captioned proceedings on June 29, 1989.

The circuit court affirmed petitioner's felony conviction in the United States District Court, Eastern District of New York, even though jury selection was conducted by a magistrate who, under the rule announced in *Gomez* v. *United States*, 109 S.Ct. 2237 (1989), did not have jurisdiction to preside. Petitioner did not execute a written consent to this procedure, nor did he knowingly and voluntarily waive his right to the presence of a district

judge. Jury selection was conducted by Magistrate John L. Caden; the balance of the trial was held before the Honorable Raymond J. Dearie, District Judge.

OPINIONS BELOW

The United States District Court for the Eastern District of New York (Dearie, J.) wrote no opinion in this case. The unpublished opinion of the United States Court of Appeals for the Second Circuit affirming petitioner's conviction on other grounds is reprinted in the appendix hereto at pp. 1a-3a.

JURISDICTION AND TIMELINESS

This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

Petitioner requests that the Court review this petition on the merits, even though it is untimely, because he has acted diligently and is not responsible for any of the delay, and because of the seriousness of the case: he is serving a 151-month sentence. Although the court of appeals' order affirming petitioner's conviction is dated June 29, 1989, the court did not at that time notify petitioner or his counsel. Indeed, unaware of the decision, prior counsel attempted by letter dated July 19, 1989, following *Gomez*, to notify the court of appeals of the existence of the magistrate issue, only to learn subsequently that the appeal already had been denied. Regrettably, prior counsel did not so notify petitioner, who is incarcerated, until August 10, 1989. Counsel's terse letter did not inform petitioner of his right to petition for rehearing or for *certiorari*. When undersigned counsel was retained in late August, he was misinformed by the circuit court clerk's office that judgment had been entered on July 21, 1989 (in fact, the date the mandate issued), as opposed to

June 29th. When counsel learned of this mistake, the August 29th deadline for a timely petition for *certiorari*, or for a motion for a 30-day extension, had passed. Nevertheless, this petition is being filed within the 30-day extension period ordinarily granted by motion.

STATUTES INVOLVED

Title 28, United States Code, Section 636 (in pertinent part):

> **§ 636. Jurisdiction, powers, and temporary assignment.**
>
> (a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment—
>
> * * *
>
> (3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.
>
> (c) Notwithstanding any provision of law to the contrary—
>
> (1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. . . .
>
> (2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor

the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matters to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

Title 18, United States Code, Section 3401 (in pertinent part):

§ 3401. Misdemeanors; application of probation laws

(a) When specially designated to exercise such jurisdiction by the district court or courts he serves, any United States magistrate shall have jurisdiction to try persons accused of, and sentence persons convicted of, misdemeanors committed within that judicial district.

(b) Any person charged with a misdemeanor may elect, however, to be tried before a judge of the district court for the district in which the offense was committed. The magistrate shall carefully explain to the defendant that he has a right to trial, judgment, and sentencing by a judge of the district court and that he may have a right to trial by jury before a district judge or magistrate. The magistrate shall not proceed to try the case unless the defendant, after such explanation, files a written consent to be tried before the magistrate that specifically waives trial, judgment, and sentencing by a judge of the district court.

STATEMENT OF THE CASE

On August 4, 1988, petitioner was indicted on narcotics charges and the case was assigned to Judge Dearie. In October, Judge Dearie assigned jury selection to the magistrate, without explaining to petitioner his right to have the district court preside, and without obtaining verbal or

written consent. At that time, settled law in the Second Circuit held that a defendant had *no* right to the presence of a district judge during jury selection; a magistrate's substitution was considered lawful even over a defendant's objection. *See United States* v. *Garcia*, 848 F.2d 1324 (2d Cir. 1988), *rev'd sub nom. Gomez* v. *United States*, 109 S.Ct. 2237 (1989). Petitioner did not lodge a futile objection.

On October 24, 1988, Magistrate Caden held jury selection.[1] Two days later, without affording petitioner any opportunity for further review, Judge Dearie swore the panel and began receiving evidence. After a two-day trial, the magistrate-selected jury found petitioner guilty on all three counts. On February 3, 1989, petitioner was sentenced to 151 months in prison, a fine of $50,000, a special assessment of $150, and five years of supervised release. He is presently serving his sentence at the Federal Correctional Institution, Raybrook, New York.

In his appeal to the circuit court, petitioner challenged the sufficiency of the evidence and the district court's application of the sentencing guidelines, but did not raise the jury selection issue. In April 1989, when petitioner's appellate brief was filed, not only was no right to have a district judge conduct jury selection recognized in the

---

[1] The transcript of the pre-jury selection proceedings was not ordered for purposes of the appeal in the court of appeals. While petitioner, through present counsel, attempted to do so in August, the court reporter's office as of this writing has been unable to identify the reporter who recorded this proceeding, but is continuing its efforts to do so. The District Court docket sheet, reproduced in the joint appendix in the court of appeals, indicates that notice of jury selection by the magistrate was issued by mail on October 5, 1988, but does not reflect that petitioner ever expressly consented, either verbally or in writing.

Second Circuit, *see Garcia, supra;* a defendant who failed to object at trial waived any appellate claims. *See United States* v. *DeFiore*, 720 F.2d 757 (2d Cir. 1983), *cert. denied*, 466 U.S. 906 (1984).

On June 29, 1989, the court below, in an unpublished order, denied petitioner's appeal. On July 19, 1989, petitioner's prior counsel, evidently unaware of the court's decision, wrote the circuit court advising it that petitioner's case raised a *Gomez* issue.[2] When petitioner belatedly learned from his attorney on August 10, 1989, that his appeal had been denied, he substituted undersigned counsel as his appellate attorney. New counsel then filed a motion in the court of appeals seeking permission to file an untimely petition for rehearing *en banc* raising the *Gomez* issue. This motion is *sub judice*.[3]

By separate motion herewith, petitioner is requesting this Court to defer consideration of this petition for *certiorari* pending a final determination in the court below.

---

[2] *Gomez* had been announced on June 12, 1989.

[3] Undersigned counsel attempted to file the petition for rehearing *en banc* and motion to proceed out of time on August 22, 1989, but the clerk's office would not accept these papers until petitioner executed a stipulation of substitution of counsel. This stipulation was obtained as quickly as possible by mail from the prisoner and was filed on September 5, 1989, but the court did not "approve" the stipulation for eight days. Only then did it accept petitioner's papers.

REASON FOR GRANTING THE WRIT

THE HOLDING IN *GOMEZ* V. *UNITED STATES* THAT A MAGISTRATE LACKS JURISDICTION TO CONDUCT JURY SELECTION IN A FELONY TRIAL REQUIRES THAT PETITIONER'S CONVICTION BE REVERSED, AT LEAST WHERE HE DID NOT EXECUTE A KNOWING, VOLUNTARY, WRITTEN CONSENT; ALTERNATIVELY, THE COURT SHOULD RESOLVE THE CONFLICT IN THE CIRCUITS CONCERNING GOMEZ'S APPLICATION TO CASES IN WHICH THE DEFENDANT FAILED TO OBJECT

In *Gomez* v. *United States*, *supra*, this Court unanimously held that the Federal Magistrates Act, 28 U.S.C. §§ 631 *et seq.*, does not empower a district court to assign, nor a magistrate to conduct, the fundamentally important function of presiding at jury selection for a federal felony trial. The Court noted that the magistrate's criminal trial jurisdiction is limited to misdemeanors and "depends on the defendant's specific, written consent." 109 S.Ct. at 2245. Observing, as the government conceded, that Congress had withheld authority for magistrates to preside at a felony trial, *id.*, the Court concluded that jury selection was a "critical stage[]" of the trial and that a magistrate who conducts this function "exceeds his jurisdiction." 109 S.Ct. at 2248. Reasoning further that a defendant's personal right to have jury selection conducted by a person with "jurisdiction to preside" is "basic," the Court rejected the government's harmless error argument. *Id.*

Because a magistrate who lacked jurisdiction presided at jury selection in petitioner's case, *Gomez* requires that this conviction, too, be reversed.[4] At the very least, this Court should direct the circuit court to reexamine its

---

[4] *Gomez* was decided when this case was on direct appeal, and thus clearly applies retroactively to it. *See Griffith* v. *Kentucky*, 479 U.S. 314 (1987).

pre-*Gomez* rule that the failure to object constitutes a waiver of this defect. *See United States* v. *DeFiore*, *supra*. Even after *Gomez* was decided, the Second Circuit refused to reconsider its pre-*Gomez* waiver rule even though, as Judge Altimari pointed out in dissent, *Gomez* was decided on jurisdictional grounds. *Compare United States* v. *Mang Sun Wong*, ___ F.2d ___, Dkt. No. 88-1100, Slip Op. 7531, 7551-52 n.2 (2d Cir., Sept. 5, 1989) (*on pet. for reh.*) with *id.* at 7552-53 (dissenting opinion).

The circuit court's waiver rule squarely conflicts with *Gomez* and is logically untenable. As the Ninth Circuit, which is thus in conflict with the Second, correctly held in *United States* v. *France*, ___ F.2d ___, 1989 Westlaw 104012 (9th Cir., September 13, 1989), a failure to object cannot waive the jurisdictional defect noticed in *Gomez*. Not only does *Gomez* hold that a magistrate has no *felony* trial jurisdiction, but Congress further circumscribed magistrates' criminal trial jurisdiction with a requirement that the defendant provide his "specific, written consent." 109 S.Ct. at 2245. Petitioner's mere acquiescence could not empower the magistrate to exercise authority that Congress had withheld. *See California* v. *LaRue*, 409 U.S. 109, 112 n.3 (1972) (parties may not confer jurisdiction upon a court by stipulation) (dictum); *McClaughry* v. *Deming*, 186 U.S. 49 (1902) (defendant's failure to object could not confer jurisdiction upon military court martial acting outside its statutorily-created jurisdiction). "[F]ederal courts are courts of limited jurisdiction marked out by Congress," *Aldinger* v. *Howard*, 427 U.S. 1, 15 (1976), which possesses "the sole power of creating the tribunals and of investing them with jurisdiction." *Cary* v. *Curtis*, 44 U.S. (3 How.) 236, 245 (1845). *See, e.g.*, 18 U.S.C. § 3231 (assigning to the district courts exclusive, original jurisdiction "of all offenses against the

laws of the United States"). If a felony defendant could empower a magistrate to act where Congress had withheld such authority, then theoretically the defendant could stipulate to trial before an arbitrator or a citizen off the street.[5]

Besides characterizing the defect as jurisdictional, *Gomez* also established that a defendant has a "basic" *personal right* to the presence of a "person with jurisdiction to preside" during the jury selection phase of a felony trial. 109 S.Ct. at 2248. Whatever the constitutional source of this right—Article III, the Fifth Amendment's due process clause, or the Sixth Amendment's right to trial by jury—its waiver surely must be knowing, voluntary, and unequivocal. *See, e.g.*, *Boykin* v. *Alabama*, 395 U.S. 238 (1969); *McCarthy* v. *United States*, 394 U.S. 459 (1969); *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938); Fed. R. Crim. P. 11(c)(3). The standards for determining waiver are highest where trial rights are involved. *See generally Schneckloth* v. *Bustamonte*, 412 U.S. 218, 237-38 (1973).

The Magistrates Act codifies these constitutionally-based waiver principles, and adds further procedural safeguards: written consent in criminal cases, *see* 18 U.S.C. § 3401(b), and prohibition in civil cases of any attempt by the district judge or magistrate to "attempt to persuade or induce any party to consent." *See* 28 U.S.C. § 636(c)(2). *See generally, Gomez* v. *United States*, *supra*, at 2244-45. Petitioner's mere acquiescence, implied from his failure to explicitly object, did not meet constitutional

---

[5] Even if a felony defendant somehow could empower a magistrate to conduct jury selection by consent, *a fortiorari* petitioner's acquiescence would not suffice given the express, written statutory consent requirements for misdemeanors and petty offenses.

standards, let alone the more rigorous statutory waiver procedure required by Congress.

The Second Circuit's continued adherence to the pre-*Gomez* waiver rule pronounced in *DeFiore* not only conflicts with the Ninth Circuit's recent decision in *United States* v. *France*, *supra*, but also with other decisions requiring literal compliance with the statute's trial-related waiver requirements in criminal cases. *See, e.g.*, *United States* v. *Marcyes*, 557 F.2d 1361, 1367 (9th Cir. 1977) (defendant's written consent was insufficient absent clear explanation on the record of his right to elect a jury trial in the district court); *United States* v. *Miller*, 468 F.2d 1041, 1043 (4th Cir. 1972) (same), *cert. denied*, 410 U.S. 935 (1973). Similarly, in civil cases, the lower courts have viewed the failure to literally comply with the Act's requirement of an express, unambiguous, knowing waiver as a jurisdictional defect that may be raised at any time. *See Lovelace* v. *Dall*, 820 F.2d 223, 225-26 (7th Cir. 1987); *Hall* v. *Sharpe*, 812 F.2d 644 (11th Cir. 1987); *Caprera* v. *Jacobs*, 790 F.2d 442, 444-45 (5th Cir. 1986); *Ambrose* v. *Welch*, 729 F.2d 1084, 1085 (6th Cir. 1984) (court of appeals *sua sponte* dismissed civil appeal due to defective, district court waiver procedure).

Whether petitioner's present challenge is based upon notions of jurisdiction, individual rights, or both, his failure to lodge a contemporaneous objection in the trial court cannot be held against him where such an objection would have been futile. "[T]he failure to object at trial does not constitute a waiver of [a] claim" where no objection was available. *Miranda* v. *Arizona*, 384 U.S. 436, 495 n.69 (1966). Petitioner should not be "penalized for abiding by the controlling law at the time." *United States* v. *France*, ___ F.2d ___, 1989 Westlaw 104012 (9th Cir., September 13, 1989) (reversing conviction where the

defendant had failed to object to assignment of jury selection to a magistrate). The failure to make a claim that would conflict with settled law does not constitute a waiver of a subsequently-established right. *Guam* v. *Yang*, 850 F.2d 507, 512 n.8 (9th Cir. 1988) (en banc) (and cases discussed therein); *United States ex rel. O'Connor* v. *New Jersey*, 405 F.2d 632, 634 n.2 (3rd Cir.), *cert. denied sub nom. O'Connor* v. *Yeager*, 395 U.S. 923 (1969); *United States* v. *Indiviglio*, 352 F.2d 276, 280 n.7 (2d Cir. 1965). Any contrary rule would encourage, indeed require, defense counsel to continually object to settled principles and to burden district courts with futile objections and claims. *United States* v. *France*, *supra*. Significantly, this Term the Court is confronting for the first time the scope of Rule 11 of the Federal Rules of Civil Procedure, which holds attorneys personally responsible for making frivolous objections or claims. *See Calloway* v. *Marvel Entertainment Group*, 854 F.2d 1452 (2d Cir. 1988), *cert. granted sub nom. Pavelic & LeFlore* v. *Marvel Entertainment Group*, 109 S.Ct. 1116 (1989).

Finally, under the jurisdictional nature of the Court's analysis in *Gomez* and the futility doctrine, this would not appear to be an appropriate case for application of the "plain error" doctrine. Indeed, even before *Gomez*, Justice White observed that, if the use of a magistrate to select a jury at a felony trial "violates either the [Magistrate's] Act or the Constitution, then it is not obvious that this violation can be dismissed under the 'plain error' doctrine." *Ford* v. *United States*, ___ U.S. ___, 108 S.Ct. 741, 742 (1988) (dissenting from denial of *certiorari*). *Gomez* makes clear that the error in substituting a magistrate for the district judge during jury selection deprives a felony defendant of a "substantial right" and, given the impossibility of establishing specific harm, requires that

"unfair prejudicial impact" be presumed. *See, e.g., Gomez, supra,* at 2247-48 ("[N]o transcript can recapture the atmosphere of the *voir dire,* which may persist throughout the trial"); *United States* v. *Young,* 470 U.S. 1, 16 n. 14 (1985). Additionally, the use of a tribunal lacking authority or jurisdiction to act surely "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Atkinson,* 297 U.S. 157, 160 (1936), quoted in *Young, supra,* at 15. There is a public interest in the administration of the federal criminal justice system by judicial officers with authority to act that transcends the failure by an individual defendant to object. *See, e.g., United States* v. *Garcia,* 848 F.2d at 1337 (Chief Judge Oakes, dissenting) (delegation of jury selection to a magistrate "demeans the process" in the jury's eyes).

CONCLUSION

For the foregoing reasons, the petition for *certiorari* should be granted and the judgment of the court of appeals summarily reversed, or else the judgment should be vacated and the matter remanded to the court below with a direction to reconsider that court's waiver rule in light of *Gomez* v. *United States*. Alternatively, the matter should be set down for full briefing and argument to resolve the important conflict in the lower courts concerning the application of *Gomez* to those cases in which the defendant did not object to the magistrate's improper exercise of jurisdiction to conduct jury selection.

Respectfully submitted,

JOEL B. RUDIN
Mass & Rudin
Attorneys for Petitioner
Ahmade Rateb Popal
415 Madison Avenue, Seventh Floor
New York, New York 10017
(212) 969-9200

DATED: New York, New York
September 26, 1989

APPENDIX

APPENDIX

United States Court Of Appeals

FOR THE
SECOND CIRCUIT

89-1067

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the 29th day of June, one thousand nine hundred and eighty-nine.

Present:

Hon. James L. Oakes,
Chief Judge.
Hon. Ellsworth A. Van Graafeiland,
Hon. George C. Pratt,
Circuit Judges.

United States of America,

Appellee,

v.

Ahmade Rateb Popal,

Appellant.

FILED JUNE 29 1989

ORDER

ISSUED AS MANDATE: July 21, 1989

Ahmade Rateb Popal appeals from a judgment of conviction in the United States District Court for the Eastern District of New York, Raymond J. Dearie, Judge. Appellant was convicted after a jury trial of conspiring to import and possess with

intent to distribute heroin, in violation of 21 U.S.C. § 846 (1982), of importing in excess of one kilogram of heroin, in violation of 21 U.S.C. § 952(a), and of possessing with intent to distribute in excess of one kilogram of heroin, in violation of 21 U.S.C. § 841(a)(1). He was sentenced under the Sentencing Reform Act, 18 U.S.C. § 3551 et. seq. (Supp. V 1987), to concurrent prison terms of 151 months, followed by five years of supervised release. He was also fined $50,000 and ordered to pay a special assessment of $150. On appeal, Popal argues (1) that the evidence of his guilt was insufficient and (2) that the district judge could have and should have departed downwardly from the Sentencing Guidelines.

With respect to his first contention, Popal compares his case to that of the successful appellant in *United States* v. *Nusraty*, 867 F.2d 759 (2d Cir. 1989). In *Nusraty*, the Government's case rested upon the appellant's presence in an airport, his meeting with an acquaintance found to have imported heroin and the appellant's false exculpatory statement. *Id.* at 764-65. This was insufficient under *Jackson* v. *Virginia*, 443 U.S. 307 (1979), and its progeny. *Id.* at 765.

We find that the circumstantial evidence of Popal's guilt is considerably greater. Popal's arrival in Shamsul Haq's hotel room, following Haq's arrest at the airport, and Haq's two telephone conversations in his hotel room, permit the inference that Popal learned where Haq was located from the person in Pakistan whom Haq had telephoned. Popal's meeting with Haq then provided sufficient evidence for a jury rationally to conclude that Popal had come to the hotel to take a consignment of heroin from Haq. We conclude that appellant has failed to sustain the heavy burden of showing that the evidence of his guilt was insufficient. *See United States* v. *Young*, 745 F.2d 733, 762 (2d Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985).

Appellant claims that the district judge was unaware of his discretion to sentence outside and below the Sentencing Guidelines or that he misconstrued his authority to depart from the Guidelines. Popal points to mitigating factors—e.g.,

his military service as an Afghan Mujahedeen fighting against the Russians—that could and should have been considered as grounds for downward departure under 18 U.S.C. § 3553(b). Our reading of the sentencing proceedings below convinces us that Judge Dearie was aware of his discretion to depart from the Guidelines. The judge noted that the information presented by Popal was worthy of consideration, but decided that it did not merit downward departure from the Guidelines. This was a proper exercise of the judge's discretion. *See United States* v. *Paulino*, No. 88-1433, slip op. at 2692 (2d Cir. Apr. 13, 1989) (per curiam); *United States* v. *Correa-Vargas*, 860 F.2d 35, 36-40 (2d Cir. 1988).

Judgment affirmed.

/s/ James L. Oakes
JAMES L. OAKES, CHIEF JUDGE

/s/ Ellsworth A. Van Graafeiland
ELLSWORTH A. VAN GRAAFEILAND

/s/ George C. Pratt
GEORGE C. PRATT, CIRCUIT JUDGES

Supreme Court, U.S.
FILED
NOV 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-525

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

AHMADE RATEB POPAL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOEL B. RUDIN
Mass & Rudin
Attorneys for Petitioner
Ahmade Rateb Popal
415 Madison Avenue
Seventh Floor
New York, New York 10017
(212) 969-9200

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

TABLE OF CONTENTS

	Page
TIMELINESS AND JURISDICTION	1
ADDITIONAL FACTS RELEVANT TO THE STATEMENT OF THE CASE	2
ADDITIONAL REASONS FOR GRANTING THE WRIT	3
CONCLUSION	5
APPENDIX	1a-5a

TABLE OF AUTHORITIES

Gomez v. *United States*, 109 S.Ct. 2237 (1989)	3-4
United States v. *France*, ____ F.2d ____, 1989 Westlaw 104012 (9th Cir., September 13, 1989	4
United States v. *Vanwort*, 887 F.2d 375 (2d Cir. 1989)	5
United States v. *Wong*, 884 F.2d 1537 (2d Cir. 1989)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-525

AHMADE RATEB POPAL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Ahmade Rateb Popal, respectfully submits this supplemental brief to his petition for certiorari to bring new materials to the attention of this Court relevant to the Court's determination of the merits and the timeliness of the petition.

TIMELINESS AND JURISDICTION

For the reasons explained in the initial petition at 2-3, the petition was filed more than 60 days from the denial of petitioner's appeal by the court of appeals. While ordinarily the 60-day period in which to file a petition for certiorari would be tolled by the filing of a timely petition

for rehearing in the court of appeals, Popal's petition for rehearing was "untimely," having been filed more than 14 days after the decision of the court of appeals denying his appeal.

However, after the docketing of this petition for certiorari on September 26, 1989, the court of appeals granted Popal's motion to file his petition for rehearing "out of time." *See* Order of the Hon. George C. Pratt, Circuit Judge, dated September 29, 1989. The petition for rehearing with suggestion for rehearing en banc is still *sub judice*. Since the court of appeals intends to decide the petition for rehearing on the merits as if it had been timely filed, we respectfully urge this Court to deem it to have been "timely" filed for the purposes of Supreme Court Rule 20.4.

In any event, we continue to request the Court to defer consideration of this petition for certiorari pending determination by the court of appeals of the petition for rehearing with suggestion for rehearing en banc. *See* Petitioner's Motion for Deferral of Consideration dated September 25, 1989.

ADDITIONAL FACTS RELEVANT TO THE STATEMENT OF THE CASE

When the petition for certiorari was filed, no pretrial transcripts were available to establish petitioner's assertion that he had not knowingly and voluntarily waived his right to the presence of a district judge during jury selection. *See* Pet. at 5 n.1. The relevant transcripts are now available and establish that petitioner never personally consented, verbally or in writing, to the substitution of a magistrate for the district court at jury selection, nor was his right to have an Art. III district judge preside ever explained to him.

The subject of jury selection by a magistrate was raised only once in petitioner's case: on September 7, 1988, during the first appearance in the case before District Judge Dearie. The transcript of this proceeding is reproduced in the supplemental appendix hereto at 1a-3a. Petitioner Popal, who had been detained without bail, was not produced by the United States Marshall for this session (2a). At the end of the status conference, the following colloquy occurred:

> THE COURT: Do either *defense counsel* have a problem with the magistrate selecting the jury?
>
> [CO-DEFENDANT'S COUNSEL]: No, your Honor.
>
> [PETITIONER'S COUNSEL]: No, *I* have no problem with that. (3a) (emphasis added).

The court then stated that whether it or a magistrate selected the jury would depend upon the court's schedule (3a).

During subsequent status conferences, the matter never arose. On October 5, 1988, notice of jury selection by a magistrate was issued to the parties. Pet. at 5 n.1. The transcript of jury selection on October 24, 1988, indicates that the jury was summoned and the selection process begun without any preliminary discussion or waiver procedure (5a).

In sum, while petitioner's *counsel* stated—in petitioner's absence—that *counsel* had "no problem" with delegation of jury selection to a magistrate, *petitioner* never *personally* consented to waive his basic right to have a duly-empowered district judge preside.

ADDITIONAL REASONS FOR GRANTING THE WRIT

Petitioner continues to maintain that, based upon this Court's decision in *Gomez* v. *United States*, 109 S.Ct. 2237

(1989), the judgment below should be summarily reversed and the matter remanded for a new trial. However, since our petition was filed, the Government itself has stressed the need for a uniform national rule to resolve the conflict in the circuits concerning the issues raised in this petition. Thus, should this Court believe that summary reversal is not warranted, it should grant certiorari so that it can determine an appropriate national rule.

The Government's statement is contained in its Petition for Rehearing With Suggestion for Rehearing En Banc [hereinafter referred to as "*France* Petition"] in *United States* v. *France*, ___ F.2d ___, 1989 Westlaw 104012 (9th Cir., September 13, 1989). The *France* Petition, served October 27, 1989, notes the conflict between the second and ninth circuits and asserts that "the panel's decision raises questions of exceptional importance." *France* Petition at 5. According to the petition, because the regular practice in the District of Hawaii prior to the decision in *Gomez* was for the magistrate to select juries in "nearly every felony trial held in that district for several years," "dozens of convictions" will have to be reversed. *Id.* Indeed, the Petition represents that 48 appeals are presently pending in the Ninth Circuit in which this issue has been or could be raised. *Id.* It then concludes: "Because . . . of the practical consequences of the panel's decision, we submit that the decision 'substantially affects a rule of national application in which there is an overriding need for national uniformity.'" *Id.* at 8.

The Government clearly is correct that there is a present need for a uniform national rule. In the Ninth Circuit, numerous convictions are being reversed, but this is occurring close in time to the defendants' arrests and trials, thereby permitting the Government a fair opportunity to retry the defendants, while sparing those

defendants who are acquitted upon retrial unnecessarily prolonged incarceration. However, in the second circuit, defendants who failed to object to magistrate-conducted jury selection are being denied retrials. *See United States* v. *Vanwort*, 887 F.2d 375 (2d Cir. 1989), petition for rehearing pending; *United States* v. *Wong*, 884 F.2d 1537, 1544-46 (2d Cir. 1989), petition for certiorari pending, Dkt. No. 89-5949. If this Court ultimately rejects the second circuit's position, but does so in a later, as opposed to this, case, the Government may not be in a position to retry many of the affected defendants, while any defendants who ultimately are acquitted upon retrial will have been subjected to unnecessary, unjust imprisonment. Because the issues raised in this case bear so directly upon the administration of justice in the federal courts and the rights of scores of defendants, the petition should be granted.

CONCLUSION

For the additional reasons set forth above, the relief requested in the petition for certiorari should be granted.

Respectfully submitted,

JOEL B. RUDIN
Mass & Rudin
Attorneys for Petitioner
Ahmade Rateb Popal
415 Madison Avenue, Seventh Floor
New York, New York 10017
(212) 969-9200

Dated: New York, New York
November, 1989

APPENDIX

APPENDIX

United States District Court

FOR THE
EASTERN DISTRICT OF NEW YORK

CR 88 455

UNITED STATES OF AMERICA,
v.
SHAMSUL HAQ AND AHMAD RATAB POPAL, *Defendant.*

United States Courhouse
Brooklyn, New York
September 7, 1988
10:00 o'clock a.m.

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE RAYMOND J. DEARIE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: ANDREW J. MALONEY
United States Attorney
BY: PETER GINSBERG, ESQ.
Assistant United States Attorney
225 Cadman Plaza East
Brooklyn, New York

For the Defendant: GERALD WEISS, ESQ.
For defendant Haq
FRANK LOPEZ, ESQ.
For defendant Popal

Court Reporter: Henry R. Shapiro
225 Cadman Plaza East
Brooklyn, New York
718-330-7687

[2] THE CLERK: Criminal cause for status conference, USA versus Shamsul Haq and Ahmad Ratab Popal.

MR. GINSBERG: Peter Ginsberg.

MR. LOPEZ: Gerald Weiss for Haq.

MR. WEISS: Frank Lopez for Popal.

THE COURT: These gentlemen had previously been arraigned?

MR. LOPEZ: Yes, they have.

THE COURT: I only see one defendant.

MR. LOPEZ: That is my client Mr. Popal through some misunderstanding, I don't think was produced today, but I have a request for these proceedings. I'm willing to waive his presence with this request.

May I proceed.

THE COURT: Please.

* * *

[5] THE COURT: I have to be perfectly forthright with all of you. The calendar being what it is, it's going to be very hard to get this in. I would ordinarily say I would like to have another judge try it, but my colleagues are really embattled with these long trials.

MR. LOPEZ: I have a case which I am starting September 26. It's the second Wedtech case. That case should go about four weeks, and that case is in the Southern District of New York.

THE COURT: I don't think they had any criminal trials in the Southern District as short as four weeks.

MR. LOPEZ: I think they have them here now, your Honor.

THE COURT: I think realistically the first date that I perceive is October 24. That is outside the speedy trial window and if there are no motions, we will have to confront that and I'll put

responsibility on you Mr. Ginsberg, in the event the defense feels it's not necessary to file any motions, we have to contend with the speedy trial situation which means either a limited waiver or some basis upon which to make a sensible exclusion. What date did you say?

MR. LOPEZ: The 24th.

THE COURT: Do either defense counsel have a problem with the magistrate selecting the jury?

MR. WEISS: No, your Honor.

[6] MR. LOPEZ: No, I have no problem with that.

THE COURT: You will get notification. We have jury selection on the 17th—

MR. WEISS: I have a problem with that date. I'm getting married on the 15th and I won't be—

THE COURT: What are your plans for that week—

MR. WEISS: Two or three days, perhaps the week.

THE COURT: Let's schedule selection for the morning of the 24th.

MR. WEISS: Thank you, your Honor.

THE COURT: That will be at 9:30. I don't know who will do it yet. If I'm finished with the trial that is immediately preceding you, I'll do it, otherwise I'll ask a magistrate. We ought to get some sense when we ought to expect motions from defense. You already stated you already started your discovery. Today is the 7th. Would the 19th be reasonable.

* * *

United States District Court

FOR THE
EASTERN DISTRICT OF NEW YORK

CR 88 455 (RJD)

UNITED STATES OF AMERICA,
v.
AHMAD POPAL, *Defendant.*

United States Courhouse
Brooklyn, New York
October 24, 1988

TRANSCRIPT OF JURY SELECTION
BEFORE THE HONORABLE JOHN L. CADEN
UNITED STATES MAGISTRATE

APPEARANCES:

For the Government:	ANDREW J. MALONEY, ESQ. United States Attorney BY: CHERYL POLLACK, ESQ. PETER GINSBERG, ESQ. Assistant U.S. Attorneys
For the Defendants:	FRANK LOPEZ, ESQ. Attorney for defendant
Court Reporter:	Henri LeGendre 225 Cadman Plaza East Brooklyn, New York (718) 330-7687

[2] (Prospective jurors enter courtroom.).

THE COURT: Would everyone please stand so Helen can administer the oath to you.

(Whereupon prospective jurors were sworn in by the Clerk of the Court.)

THE COURT: Helen will call out last names—can the men and women hear me okay?

Can everybody hear me okay?

Helen is about to call out 12 names; the first six names will have a seat at my immediate left, one through six, one being closest to me; then we'll fill in the second row similarly with jurors seven through twelve and we'll leave those end seats vacant. If Helen mispronounces anyone's name would you be kind enough to correct us, please.

THE CLERK: Juror No. One, Cornelius Brown.

Juror No. Two, Cynthia Schultz.

Juror No. Three, Dominico Cintron.

Juror No. Four, Bruce Burnett.

Juror No. Five, Albert Ferrer.

Juror No. Six, Dominick Diorio.

Juror No. Seven, Bernard Applewhite.

Juror No. Eight, Edward Hendrickson.

Juror No. Nine, Stanley Lowe.

Juror No. Ten, Arcay Star.

Juror No. Eleven, Marshall Edell.

[3] Juror No. Twelve, Irving Ackerman.

THE COURT: Good Afternoon. We are about to begin the selection of a jury in a criminal case.

[Preliminary legal instructions and *voir dire* conducted].

* * *

Supreme Court, U.S.
FILED
NOV 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 89-525

In the Supreme Court of the United States

OCTOBER TERM, 1989

AHMADE RATEB POPAL, PETITIONER

v.

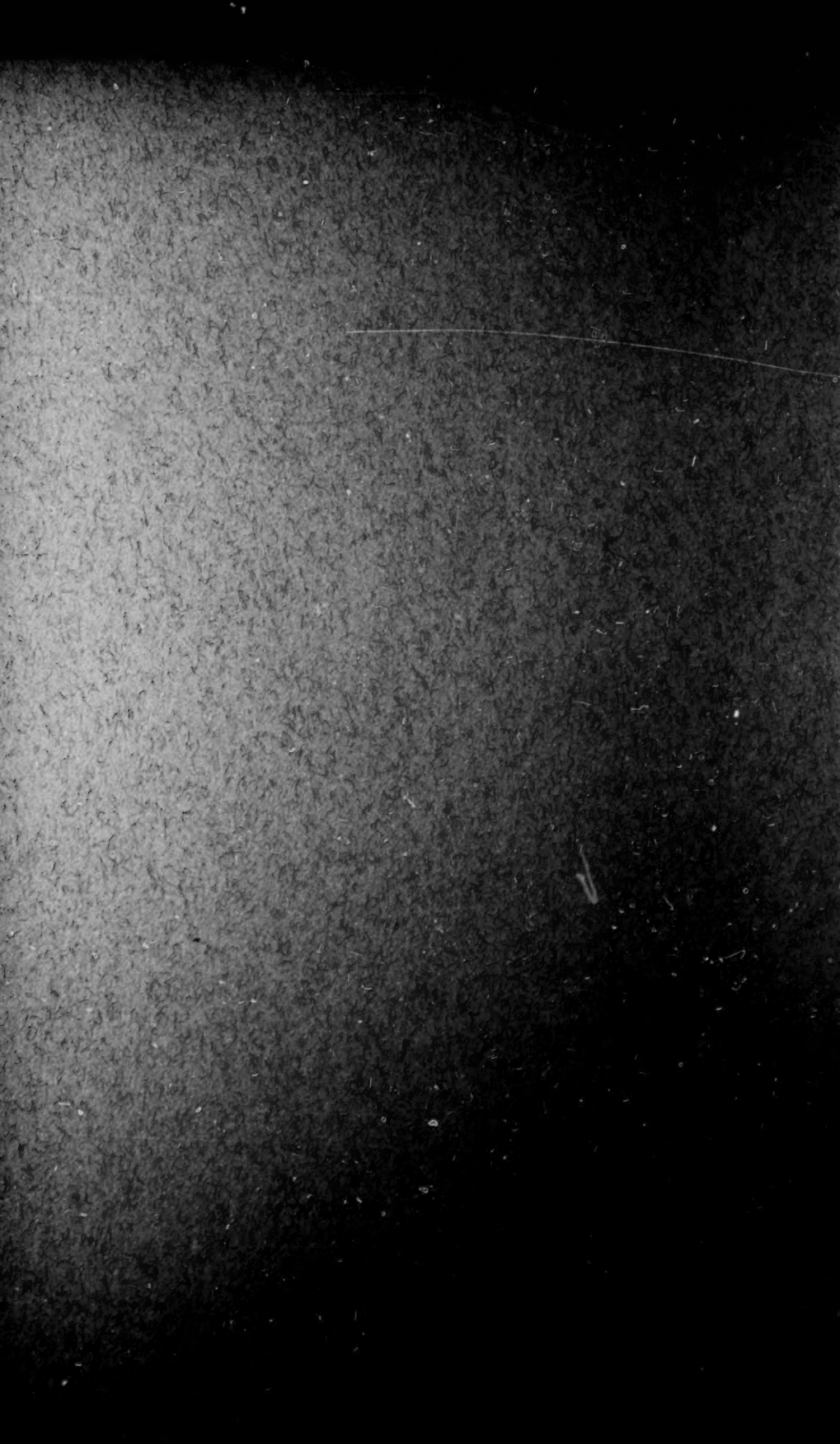
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
J. DOUGLAS WILSON
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

10 pp



QUESTION PRESENTED

Whether petitioner's convictions must be reversed because a magistrate presided over jury selection at his trial, even though petitioner's counsel consented to that procedure.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	3
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Adams v. *United States ex rel. McCann*, 317 U.S. 269 (1942)	5
Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970)	4
Barker v. *Wingo*, 407 U.S. 514 (1972)	5
Garner v. *United States*, 424 U.S. 648 (1976)	5
Gomez v. *United States*, 109 S. Ct. 2237 (1989)	3, 4, 6
Jones v. *Barnes*, 463 U.S. 745 (1983)	5
Pacemaker Diagnostic Clinic of America, Inc. v. *Instromedix, Inc.*, 725 F.2d 537 (9th Cir.) cert. denied, 469 U.S. 824 (1984)	6
Reed v. *Ross*, 468 U.S. 1 (1984)	5
United States v. *Cronic*, 466 U.S. 648 (1984)	5
United States v. *France*, 886 F.2d 223 (9th Cir. 1989)	3
United States v. *Lovasco*, 431 U.S. 783 (1977)	4
United States v. *Mang Sun Wong*, 884 F.2d 1537 (2d Cir. 1989), petition for cert. pending, No. 89-5949	4
United States v. *Rodgers*, 466 U.S. 475 (1984)	6
Wainwright v. *Sykes*, 433 U.S. 72 (1977)	5
Zipes v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982)	6

Statutes: Page

Controlled Substance Act, Tit. II, 21 U.S.C. 841 *et seq.*:
21 U.S.C. 841(a)(1) 2
21 U.S.C. 846 2
18 U.S.C. 1001 6
21 U.S.C. 952(a) 2

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-525

AHMADE RATEB POPAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1989. A petition for rehearing, which was filed out of time, is currently pending before the court of appeals.[1] The petition for a writ of certiorari was filed on September 26, 1989, and therefore is untimely under Rule 20.1 of the Rules of this Court if the date of the court of appeals' judgment

[1] The court of appeals granted petitioner's request to file the petition out of time.

is viewed as the start of the 60-day period. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of importing more than a kilogram of heroin into the United States, 21 U.S.C. 952(a), possessing more than a kilogram of heroin with intent to distribute it, 21 U.S.C. 841(a)(l), and conspiring to violate the Controlled Substances Act, 21 U.S.C. 846. He was sentenced to a term of 151 months' imprisonment and fined $50,000. The court of appeals affirmed. Pet. App. la-3a.

1. On September 7, 1988, the district court held a pretrial status conference. Petitioner's counsel, who had requested the conference, waived petitioner's right to be at the conference. Supp. Br. App. 2a. During the conference, the district court asked petitioner's counsel whether he "ha[d] a problem with the magistrate selecting the jury." *Id.* at 3a. Petitioner's counsel replied: "No, I have no problem with that." *Ibid.*[2] A magistrate therefore presided over jury selection, and after the trial petitioner was found guilty of the charges described above.

2. On appeal, petitioner did not raise as an issue the district court's referral of jury selection to a magistrate. Instead, petitioner challenged the sufficiency of the evidence

---

[2] Thus the petition inaccurately states (Pet. 4-5 & n. 1) that the district judge did not seek consent before he assigned jury selection to the magistrate. Since the filing of the petition, petitioner's counsel in this Court has obtained the transcript of the September 7, 1989, conference, which clearly shows that petitioner's trial counsel consented to the delegation of jury selection to a magistrate. On November 21, 1989, petitioner served the government with a supplemental brief that acknowledges that point.

and the district court's refusal to depart from the federal sentencing guidelines. The court of appeals rejected both of those arguments. Pet. App. la-3a.

On July 19, 1989, after the court of appeals had issued its decision, petitioner claimed, for the first time, that the trial court's referral of jury selection to a magistrate required reversal of his convictions. Pet. 6. In a letter to the court of appeals, petitioner's counsel referred to this Court's decision in *Gomez* v. *United States,* 109 S. Ct. 2237 (1989), in which the Court reversed a conviction where a magistrate conducted jury selection over the objection of the defendant. Petitioner later received the court of appeals' permission to file an untimely petition for rehearing raising the question whether *Gomez* required reversal of his conviction. That petition for rehearing is now pending.

ARGUMENT

1. Petitioner frames the question presented (Pet. i) as whether his convictions must be reversed because a magistrate presided over jury selection without petitioner's consent. That question, however, is not properly presented for review for two reasons.

First, the transcript of the pretrial proceedings – which petitioner's counsel did not have when he prepared the petition for a writ of certiorari (Pet. 5 n.1) – shows that petitioner's counsel expressly consented to the magistrate's conducting jury selection. Contrary to petitioner's contention (Pet. 6-8), therefore, this case is not like *Gomez*, where the defendant objected to the magistrate's role. Nor is it like *United States* v. *France*, 886 F.2d 223 (9th Cir. 1989), where the defendant neither objected nor consented to the court's use of a magistrate to select the jury.[3] Here, petitioner's

[3] In *France*, the Ninth Circuit held that a defendant did not waive a claim based on the Magistrates Act by failing to object to the

counsel agreed in open court to have a magistrate preside at the jury selection.

Second, petitioner did not argue in his brief on appeal that his conviction must be reversed because a magistrate conducted voir dire. It is well settled, however, that an issue not raised in the district court or the court of appeals is not properly presented for this Court's review. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

2. In any event, petitioner is incorrect in arguing that *Gomez* requires reversal of his convictions. The Court framed the issue before it in *Gomez* as "whether [a magistrate's] presiding at the selection of a jury in a felony trial *without the defendant's consent* is among" the duties that the Magistrates Act authorizes magistrates to perform. 109 S. Ct. at 2239 (emphasis added). The Court held that the statute does not authorize that procedure. The Court further ruled that the error could not be deemed harmless when, "*despite the defendant's objection*, and without any meaningful review by a district judge, an officer exceeds his jurisdiction by selecting a jury." 109 S. Ct. at 2248 (emphasis added). Accordingly, this Court explicitly limited the reach of its holding in *Gomez* to situations in which the district court delegated jury selection to a magistrate without the defendant's consent. Thus, as the court of appeals held in *United States* v. *Mang Sun Wong*, 884 F.2d 1537, 1546 (2d Cir. 1989), petition for cert. pending, No. 89-5949, the *Gomez* decision does not require the reversal of a convic-

---

magistrate's presiding at voir dire. The court held that any objection would have been futile in light of settled Ninth Circuit precedent. This case, by contrast, does not involve a mere failure to object; petitioner's counsel expressly consented to a magistrate's conducting voir dire. Nor was the law in the Second Circuit settled at the time of the voir dire in this case. At the time, the Second Circuit's decision in *Gomez* was on review in this Court.

tion where the defendant consented to the magistrate's conducting voir dire.[4]

This is true even though it was petitioner's counsel – not petitioner himself – who agreed to have a magistrate conduct voir dire. In general, a criminal defendant "is bound by the * * * decisions of [his] counsel." *Reed* v. *Ross*, 468 U.S. 1, 13 (1984). See also *United States* v. *Cronic*, 466 U.S. 648, 658 (1984) ("we presume that the lawyer is competent to provide the guiding hand that the defendant needs"). The defendant's personal consent is needed only for a few "fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983); see *Wainwright* v. *Sykes*, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring) ("[o]nly such basic decisions as whether to plead guilty, waive a jury [trial], or testify in one's own behalf are ultimately for the accused to make"). The decision whether to consent to the magistrate's conducting jury selection is not one of those basic decisions that cannot be made by counsel on the defendant's behalf.

3. Petitioner nevertheless maintains (Pet. 8-9) that the supervision of jury selection by a magistrate is a "jurisdictional defect" in the sense that the error may never be waived or cured by consent. That contention misapprehends this Court's use of the word "jurisdiction" in the *Gomez* opinion.

In *Gomez*, this Court held that the error under the Magistrates Act was not harmless because a defendant has

---

[4] This Court has often held that a defendant may waive important constitutional rights. For example, the Court has held that a defendant may waive the right to be free from compulsory self-incrimination, *Garner* v. *United States*, 424 U.S. 648, 654 n.9 (1976), the right to counsel, *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 275 (1942), and the right to a speedy trial. *Barker* v. *Wingo*, 407 U.S. 514, 525-528 (1972). The statutory right to have a district judge preside at jury selection occupies no special status that would preclude its waiver.

a basic right "to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside." 109 S. Ct. at 2248. In context, the Court's use of the word "jurisdiction" appears to refer to the trial court's statutory authority—*i.e.*, that the district court had no authority under the Magistrates Act to refer jury selection to a magistrate. See also *United States* v. *Rodgers*, 466 U.S. 475, 479-480 (1984) (defining "jurisdiction" in 18 U.S.C. 1001 to mean "official, authorized functions"); cf. *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 395 (1982) (holding that time limit for filing Title VII claims could be waived or tolled even though Court had earlier termed the requirement "jurisdictional"). It does not follow, therefore, that the district court lacked subject matter jurisdiction in this case to enter a judgment of conviction. Nothing in *Gomez* even remotely suggests that the magistrate's supervision of jury selection divested the district court of the power to enter a judgment of conviction. As the Ninth Circuit noted in *Pacemaker Diagnostic Clinic of America, Inc.* v. *Instromedix, Inc.*, 725 F.2d 537, 543 (en banc), cert. denied, 469 U.S. 824 (1984), "[t]he maxim that parties may not consent to the jurisdiction of federal courts * * * applies only where the parties attempt to confer upon an Article III court a subject matter jurisdiction that Congress or the Constitution forbid[s]."

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
J. DOUGLAS WILSON
Attorney

NOVEMBER 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—262 203/00621

Supreme Court, U.S.
FILED
DEC 14 1989
JOSEPH F. SPANIOL
CLERK

No. 89-525

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

AHMADE RATEB POPAL,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOEL B. RUDIN
MASS & RUDIN
Attorneys for Petitioner
Ahmade Rateb Popal
415 Madison Avenue, Seventh Floor
New York, New York 10017
(212) 969-9200

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

TABLE OF CONTENTS

Page

INTRODUCTION 1
ARGUMENT 2
CONCLUSION 8

TABLE OF AUTHORITIES

Cases	Page
Gomez v. *United States*, 109 S.Ct. 2237 (1989)	*passim*
Griffith v. *Kentucky*, 479 U.S. 314 (1987)	2
Jones v. *Barnes*, 463 U.S. 745 (1983)	6
Reed v. *Ross*, 468 U.S. 1 (1984)	4
Schneckloth v. *Bustamonte*, 412 U.S. 218 (1973)	5-6
United States v. *Baron*, ___ F. Supp. ___, 1989 WL 115625 (D. Hawaii Oct. 10, 1989)	3
United States v. *France*, 886 F.2d 223 (9th Cir. 1989)	3
United States v. *Garcia*, 848 F.2d 1324 (2d Cir. 1989)	4
United States v. *Mang Sun Wong*, 884 F.2d 1537 (2d Cir. 1989), pet. for cert. pending, No. 89-5949	3
United States v. *Rubio*, ___ F. Supp. ___, 1989 WL 115164 (D. Del. Sept. 26, 1989)	3
Wainwright v. *Sykes*, 433 U.S. 72	6

OTHER AUTHORITIES

United States Constitution, Article III	4, 5, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-525

AHMADE RATEB POPAL,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INTRODUCTION

In light of *Gomez* v. *United States*, 109 S.Ct. 2237 (1989), respondent's brief in opposition does not dispute that the magistrate who selected the jury that tried and convicted petitioner had no constitutional or statutory authority to do so. Nor does respondent dispute that the issues raised in this case are significant and should be resolved by this Court. Rather, respondent advances three unpersuasive arguments why *certiorari* should be denied.

ARGUMENT

I. Respondent argues preliminarily that the petition is procedurally flawed because petitioner's counsel "consented" at a pretrial status conference, held *in petitioner's absence*, to jury selection by a magistrate, and because petitioner then did not raise the issue in the court of appeals. However, counsel's purported "consent" is not a procedural flaw, but relates directly to the substantive issue at the heart of Mr. Popal's petition: whether the jurisdictional defect recognized in *Gomez* is waivable and, if so, whether the defendant must personally make such a waiver knowingly, voluntarily, and in writing. The argument that *certiorari* should be denied on the basis of the casual waiver procedure conducted in petitioner's absence begs the question of what procedure, if any, constitutes a waiver under *Gomez*.

Secondly, as respondent concedes, the court of appeals agreed to review petitioner's untimely motion for rehearing of his appeal, which raised the precise issues raised herein. Thus, respondent's claim (Brf. in Opp. at 4) that the magistrate issue was not raised in the court of appeals is incorrect. Respondent has cited no case holding that a party is precluded from raising an issue in this Court that it first raised in the court of appeals in a petition for rehearing as opposed to its opening brief. Moreover, the new rule recognized in *Gomez* must be applied retroactively to all cases pending on direct review or not yet final. *See Griffith* v. *Kentucky*, 479 U.S. 314 (1987). Having sought retroactive application of *Gomez* in the court of appeals and having been denied, petitioner is plainly entitled to seek relief in this Court.[1]

[1] Petitioner's rehearing petition in the court of appeals, which was pending when his petition for certiorari and supplemental brief were filed, was denied without opinion on November 21, 1989. At that time, petitioner notified this Court by letter and withdrew his motion to defer consideration of this petition.

Respondent, seeking to minimize the conflict between the second and the ninth circuits, suggests that *United States* v. *France*, 886 F.2d 223 (9th Cir. 1989), was decided only on futility of objection grounds. Govts. Brf. at 3 and n.3. In fact, the ninth circuit's opinion holds both that objection would have been futile *and* that *Gomez* was decided on broad, jurisdictional grounds. The court stated:

> [W]e find absolutely no indication in the tenor or the text of the opinion [in *Gomez*] to suggest that the Court relied on, or did more than note—in the interest of providing a full and accurate description of the facts before it—the fact the petitioners had objected to the magistrate's conducting voir dire . . . . We do not think . . . that the Court intended to limit the broad, definitive rule it announced to the precise facts before it.

886 F.2d at 227. *See United States* v. *Mang Sun Wong*, 884 F.2d 1537, 1546 (2d Cir. 1989) (Altimari, J., dissenting) ("consent of the defendant cannot enlarge those powers of the office not granted by the Federal Magistrates Act"), petition for certiorari pending, No. 89-5949; *United States* v. *Baron*, ___ F.Supp. ___, 1989 WL 115625 (D. Hawaii Oct. 10, 1989) ("This Court reads *Gomez* as prohibiting a magistrate from conducting voir dire, even with a defendant's consent"; conviction set aside on collateral attack even though the defendant did not contemporaneously object). *But see United States* v. *Rubio*, ___ F. Supp. ___, 1989 WL 115164 (D. Del. Sept. 26, 1989) (*Gomez* not applied retroactively on collateral attack where the defendant had failed to contemporaneously object).

The Government also incorrectly suggests that objection in petitioner's case would not have been futile because the law in the second circuit was not "settled" at the time

of trial. Govts. Brf. at 3 n.3. On October 24, 1988, when jury selection in petitioner's case was held, the controlling authority in the second circuit was *United States* v. *Garcia*, 848 F.2d 1324 (2d Cir. 1988). *Certiorari* to review that case was not granted until after petitioner's trial. *See Gomez* v. *United States*, 109 S.Ct. 782 (1989) (order granting *certiorari*). Petitioner could not have been expected to voice a seemingly futile objection to a procedure that had been routinely followed in the Eastern District of New York and specifically upheld by the court of appeals. *See generally Reed* v. *Ross*, 468 U.S. 1, 15-19 (1984).

II. Respondent maintains that *Gomez* is limited to "situations in which the district court delegated jury selection to a magistrate without the defendant's consent." Govts. Brf. at 4. To establish "consent" in this case, respondent then relies upon the statement by petitioner's counsel during the first status conference in the case, when petitioner was not present, that *counsel* had no objection to such a procedure.[2] Respondent points to nothing in the record to establish that *petitioner* was ever informed that he had a right to jury selection by a district judge, that he could object to jury selection by a magistrate, or that his right to an Art. III judge had been "waived" on his behalf by his counsel. Indeed, respondent does not dispute that, after defense counsel made his statement in his client's absence, the matter was never again discussed.

---

[2] While it is true that petitioner's counsel "waived" petitioner's presence at this initial status conference, counsel had no reason to suspect that the subject of jury selection before a magistrate would be raised at such an early juncture. Nor, of course, did petitioner, who was supposed to have been produced in court, have any opportunity to consider whether to waive his own presence.

This Court should summarily reject respondent's contention that a casual "waiver" by a defendant's counsel outside the defendant's presence can somehow suffice to take a case outside *Gomez's* ambit. *Gomez* holds that a magistrate has no authority to select a jury in a felony trial, both because Congress withheld *any* felony trial jurisdiction for magistrates, and because, as a prerequisite for magistrates to exercise *any* criminal trial jurisdiction, the defendant must *personally* execute a specific, *written* consent. *See* discussion in Pet. at 7-8. *Gomez* also repeatedly refers to legislative history establishing Congress' determination to require a knowing, personal consent by the litigant before the latter may be deprived of his constitutional right to trial before an Art. III tribunal. 109 S.Ct. at 2244-45 and nn. 21, 24. Respondent simply fails to address how petitioner could have vicariously waived his "basic" right to the presence of an Art. III judge during jury selection without even being informed that he had done so.

To justify the casual "consent" process followed in this case, respondent argues that the right at stake was not significant enough to require the defendant's express, personal waiver. But *Gomez* held that a defendant's right to the presence of a "person with jurisdiction to preside" is such a "basic" fair trial right that the harmless error doctrine does not apply. *Gomez*, 109 S.Ct. at 2248. Indeed, the Court equated a felony defendant's right to the presence of a competent tribunal at trial with other bedrock structural protections, such as the right to an impartial judge or jury. *Id.* The Court has always required waiver of such basic structural prerequisites of a constitutionally fair trial to be knowingly and intelligently made by the *defendant*. *See* cases cited in Pet. at 9 and discussed in *Schneckloth* v. *Bustamonte*, 412 U.S. 218,

237-41 (1973). Congress, too, viewed the right to an Art. III tribunal as fundamental, and explicitly required that waiver of this constitutional right be express, knowing, personal, and, in criminal cases, written. Contrary to respondent's suggestion (Brf. at 5), waiver of such a basic, structural trial protection is not at all like waiver of an evidentiary objection during trial, an instantaneous decision that necessarily must be made by counsel in most instances, *see Wainwright* v. *Sykes*, 433 U.S. 72, 92-93 (Burger, C.J. concurring), or like trained appellate counsel's strategic determination to omit a point on appeal, *see Jones* v. *Barnes*, 463 U.S. 745 (1983).

In its effort, despite *Gomez*, to trivialize the significance of the right that petitioner is said to have vicariously waived, respondent minimizes the right as merely "statutory" in origin. Brf. at 5 n.4. But the right to trial before a life-tenured, district judge is created by Art. III of the Constitution, not the Federal Magistrates Act. The Act's limited trial provisions merely permit a defendant, in misdemeanor cases, to waive this right. But withholding from magistrates *any* felony trial jurisdiction, the Act *precludes* a felony defendant from waiving his Art. III trial right in felony cases.

III. Respondent further argues that the defect in assigning jury selection to a magistrate did not involve "subject matter jurisdiction," and therefore was waivable. Respondent advances the curious argument that the Court's use of the word "jurisdiction" was addressed to the district court's lack of "statutory authority" to assign jury selection to the magistrate, as opposed to the magistrate's own lack of power to act. Brf. at 6. This is a meaningless, and an incorrect, distinction.

The Court's repeated use of the terms "jurisdiction", "power", and "authority" in *Gomez* clearly related to the

concept of "subject matter jurisdiction." The issue in *Gomez* was whether Congress' determination to withhold from magistrates jurisdiction over the subject matter of federal felony trials included the jury selection phase of such felony prosecutions. The Court noted that the Magistrates Act had created trial jurisdiction for magistrates over the subject matter of civil cases and misdemeanors, but that, as the Government conceded, it had withheld any "authority" for magistrates to try felonies. *See Gomez*, 109 S.Ct. at 2245 and n.22. *Gomez* determined that Congress did not intend to empower magistrates to preside over the subject matter of jury selection for a felony trial, and thus that district courts could not properly assign such a function. It is irrelevant that the federal court that "delegates" authority to a magistrate has subject matter jurisdiction. Once the assignment is made, it is the *magistrate*, not the court, which purports to exercise felony trial "jurisdiction."

In effect, respondent argues that, so long as the tribunal that enters judgment has jurisdiction to do so, its delegation of the proceedings leading up to judgment to a tribunal lacking authority to act is not a jurisdictional defect. But surely a district court, even with a defendant's explicit consent, could not assign the full trial of a felony case to a non-Art. III officer while reserving authority to enter judgment. The proceedings would be void because the person presiding at the pre-judgment proceedings would have lacked constitutional or statutory authority to act. Similarly, where such a person lacking "jurisdiction to preside," *Gomez*, 109 S.Ct. at 2248, selects the jury, the proceeding is void. Jury selection is a "critical stage[] of a criminal trial." *Id.* The district court may not enter a judgment of conviction based upon a verdict returned by such an illegally-constituted body.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOEL B. RUDIN
MASS & RUDIN
Attorneys for Petitioner
Ahmade Rateb Popal
415 Madison Avenue, Seventh Floor
New York, New York 10017
(212) 969-9200

DATED: New York, New York
December, 1989